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No. 90-941

In The

Supreme Court of the United States

October Term, 1990

THE TOWN OF SUNNYVALE, TEXAS,

Petitioner,

vs.

CHARLES MAYHEW, SR., et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF IN OPPOSITION

CHARLES L. SIEMON
Counsel of Record
GERALD P. CALLAGHAN
JAMES N. AZIM, III
SIEMON, LARSEN & PURDY
Dearborn Station
47 West Polk Street
Chicago, Illinois 60605
(312) 939-7117
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION

Respondents respectfully pray that this Court deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Texas.

JURISDICTION

The Petitioner's jurisdictional statement invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). However, as the Respondents show in Section I of their Reasons for Denying the Writ, jurisdiction does not properly lie with this Court because the decision from which

the Town appeals is not a "final judgment" within the meaning of § 1257(a).

SUMMARY OF ARGUMENT

The writ should be denied because this Court is without jurisdiction under 28 U.S.C. § 1257(a) to review this case, and the Petitioner, the Town of Sunnyvale, Texas ("the Town"), has failed to show that this case presents a substantial federal question meriting the attention of this Court.

Jurisdiction does not properly lie with this Court because the decision below of the Court of Appeals of Texas is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). The Court of Appeals of Texas merely affirmed in part the trial court's granting of the Town's defensive motion for summary judgment, reversed in part the trial court's judgment and remanded the case for a trial on the merits. The Supreme Court of Texas declined to review this decision. Given this procedural history and posture, it is clear that there has been no "final judgment," and this Court is without jurisdiction to review this case.

In the event that this Court finds there was a final judgment in the state court, it should nevertheless deny the writ because the case does not present a substantial federal question meriting the attention of the Court. Each of the Town's four arguments for granting the writ fails for lack of a sufficient basis in law and fact. Contrary to the Town's assertions: (1) the Court of Appeals of Texas correctly found that the Respondents' ("the Mayhews")

taking claim is ripe as a matter of law; (2) the Court of Appeals of Texas correctly applied federal taking law; (3) the Mayhews' vagueness challenge is not precluded by a determination that the Town's denial of development approval was a legislative act; and (4) underlying facts and factual issues are relevant to a court's consideration of the Mayhews' facial constitutional challenges. Therefore, this case does not present a substantial federal question meriting the attention of this Court, and the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I.

This Court Should Deny The Petition For A Writ Of Certiorari Because The Decision Of The Court Of Appeals Of Texas Was Not A Final Judgment

The Town's jurisdictional statement invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). However, jurisdiction does not properly lie with this Court because the decision from which the Town appeals was not a "final judgment" within the meaning of § 1257(a).[1] Therefore, this Court should deny the Town's Petition for a Writ of Certiorari.

The Court's jurisdiction to review state court judgments is limited to the review of "[f]inal judgments or

[1] It should be noted that the Town appears to have asked this Court to direct a writ of certiorari to the incorrect court. If a writ were to issue, it should be directed to the Court of Appeals of Texas, the highest state court which has reviewed this case.

decrees rendered by the highest court of a State in which a decision could be had. . . . " 28 U.S.C. § 1257(a). In order to satisfy this finality requirement, the state court judgment must be final in two respects. *Market Street Ry. Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945). First, the judgment must not be subject to further review or correction in any other state tribunal. *Id.* Second, the judgment must be final, as an effective determination of the litigation, not merely an interlocutory or intermediate step. *Id.* "It must be the final word of a final court." *Id.* The present case clearly does not satisfy these criteria.

Here the judgment from which the Town appeals *is* subject to further review and *is not* an effective determination of the litigation. In the proceedings below, a Texas trial court granted the Town's defensive motion for summary judgment without opinion. Upon appeal, the Court of Appeals of Texas affirmed the trial court's judgment in part, reversed the trial court's judgment in part and remanded the case to the trial court for a trial on the merits. The Supreme Court of Texas declined to review this decision and the case now resides in the Texas trial court where it is scheduled for trial on June 3, 1991. Given this procedural history and the present posture of the case, it is evident that the final judgment requirement has not been met and that the Town is merely attempting to circumvent an effective determination of the litigation. Therefore, this Court should not accept this case for review.

This Court's opinion in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981) is instructive on this point. Similar to the present case, *San Diego Gas & Electric* involved a claim by a landowner that the City of

San Diego had "taken" its property without payment of just compensation by rezoning the landowner's property and adopting an open space plan. 450 U.S. at 624-626. The landowner won damages in a California state court action, but his claims for mandamus and declaratory relief were dismissed prior to trial. *Id.* at 626-627. Following an affirmance by the California Court of Appeals, the Supreme Court of California transferred the case back to the appellate court for reconsideration in light of its intervening decision eliminating such damage actions in lieu of mandamus or declaratory relief. *Id.* at 627-628. The appellate court then reversed the damage award and commented that there were disputed fact issues unresolved by the trial court. *Id.* at 630. These issues, the appellate court suggested, could be addressed if the landowner elected to retry the case. *Id.* The Supreme Court of California denied further review and the landowner appealed to this Court. *Id.*

This Court dismissed the landowner's appeal because of the absence of a "final judgment" under 28 U.S.C. § 1257. *Id.* This Court found that the state appellate court's decision contemplated further proceedings in the trial court and that its decision was, therefore, not final. Accordingly, this Court held that it was without jurisdiction to review the decision. *Id.* at 632-633.

Likewise, this Court is without jurisdiction to review the present case. Just as the state appellate court in *San Diego Gas & Electric* contemplated further proceedings in the trial court in order to resolve disputed issues of fact, here the Texas appellate court found that there are material issues of fact and remanded the case for trial to resolve those issues. Therefore, under *San Diego Gas &*

Electric, there has not been a "final judgment" in the Texas state courts, and this Court is without jurisdiction to review the case.

This Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) does not alter this conclusion. In *Cox* this Court identified four categories of cases in which state court decisions have been treated as final judgments even though further proceedings in a state trial court were anticipated.[2] 420 U.S. at 477. A plain reading of the last three categories, in light of the procedural posture and history of the present case, clearly shows that the decision appealed from is not a "final judgment" under any of those exceptions. In addition, this Court made clear in *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981), that the first category also may not be read so broadly as to include the present case.

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[2] The four categories of cases identified by this Court are:

1. "[C]ases in which there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is preclusive or the outcome of further proceedings preordained." 420 U.S. at 479.

2. Cases "in which the federal issue, finally decided by the highest court of the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480.

3. Cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481.

4. Cases where "refusal immediately to review the state court decision might seriously erode federal policy. . . . " *Id.* at 483.

In *Minnick*, this Court rejected an argument that a state court decision qualified as a "final judgment" under the first category, and it dismissed the writ of certiorari. 452 U.S. at 127. This Court emphasized that the first *Cox* category is delimited by a comment in the *Cox* opinion that, in first (and second) category cases,

> "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question."

Id. at 122 (quoting *Cox*, 420 U.S. at 478). Because this Court was not persuaded that the outcome of further state court proceedings was certain or that those proceedings would not have a significant effect on the constitutional issues presented, *id.* at 120, this Court found that it should not address the constitutional issues until the conclusion of proceedings in the state trial court and any further state court appeals. *Id.* at 127.

Likewise, this Court should not review the present case until the conclusion of a trial on the merits and any further state court appeals. The outcome of the proceedings before the Texas trial court are far from certain. Nor can one reasonably argue that a trial on the merits of the Mayhews' federal constitutional claims would not have a significant effect on the constitutional issues presented by this case. Therefore, the decision of the Court of Appeals of Texas does not qualify as a final judgment under *Cox*, and this Court is without jurisdiction to review that decision.

II.

This Court Should Deny The Town's Petition For A Writ Of Certiorari Because This Case Does Not Present A Substantial Federal Question Meriting The Attention Of The Court

In the event that this Court finds there was a final decision in the Court of Appeals of Texas, this Court should nevertheless deny the writ because the Town's arguments are meritless and fail to show that this case presents a substantial federal question meriting the attention of the Court.

A.

The Mayhews' Taking Claim Is Ripe

The Town's contentions that the Court of Appeals of Texas ("the state court") disregarded federal ripeness law and that the Mayhews' taking claim is not ripe for review are erroneous. A plain reading of the state court's opinion shows that the court found the Mayhews' taking claim ripe as a matter of law. Moreover, the court's ripeness determination is firmly supported by the facts of record.

The crux of the Town's ripeness argument is that the state court erroneously characterized the ripeness and futility issues as questions of fact to be resolved by a jury. Petition for a Writ of Certiorari ("Pet."), pp. 6-7. This assertion, however, misconstrues the state court's opinion. Nowhere in its opinion did the state court declare or even imply that the determination of ripeness (or, if applicable, the futility exception to the ripeness doctrine) is a question of fact to be left to a jury. To the contrary, the state court simply and clearly held that there is a genuine

issue of material fact regarding the Town's intention to prevent development of the Mayhews' property, and that the existence of this issue precluded entry of summary judgment for the Town. Consequently, the Town's ripeness argument is without merit.

As the Town itself noted, the state court denied the Town's motion for summary judgment because there was

> a genuine issue of material fact as to whether the Town, by rejecting [the Mayhews'] application, intended to prevent [the Mayhews'] development of [their] property in order to impose a servitude upon the property to preserve the natural and traditional character of the land for the benefit of the public.

Mayhew v. Town of Sunnyvale, 774 S.W.2d 284, 292 (Tex.App.-Dallas 1989, writ denied), Appendix to Petition for a Writ of Certiorari ("App. to Pet."), p. 19 (emphasis added). It is evident on the face of this holding that it is directed to the issue of whether the Town effected a taking of the Mayhews' property, and not to the issue of whether the Mayhews' taking claim is ripe.[3] Nevertheless, the Town seeks to alchemize the state court's holding into a conclusion that there is an issue as to the ripeness of the Mayhews' taking claim which must be resolved by a jury.

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[3] In finding that there is a factual issue regarding the Town's intention to prevent the development of the Mayhews' property, the state court was following established Texas taking law, *Mayhew*, 774 S.W.2d at 289-290, App. to Pet. 12-13 (discussing *City of Austin v. Teague*, 556 S.W.2d 400 (Tex.App.-Waco 1977), *rev'd on other grounds*, 570 S.W.2d 389 (Tex. 1978)).

On the basis of the state court's statements regarding the issue of the Town's intent to prevent the development of the Mayhews' property, the Town concludes:

> The court *apparently determined* that if the Town would not allow the Mayhews to reapply for a less intensive yet economically viable use of their property because of the Town's "intent" to take their property without just compensation, then the case was ripe for adjudication since further applications by the Mayhews would be futile.

Pet. 6 (emphasis added). However, the state court's discussion of the Town's intent to foreclose development of the Mayhews' property is a very thin reed upon which to rest a claim that the state court threw the ripeness issue to the jury. Indeed, a plain reading of the state court's opinion shows that the court examined the summary judgment proofs on the ripeness issue and found as a matter of law that the Mayhews' taking claim is ripe.

The state court was well briefed on and had ample opportunity to review the summary judgment evidence regarding the ripeness issue. On the basis of this evidence and argument, and notwithstanding the Town's insistence that the Town council was amenable to alternative development proposals at various densities, the state court concluded as a matter of law that the Town had made a "final decision" with respect to the application of its land use regulations to the Mayhews' property:

> [W]hen the time came for the town council to vote on the [Mayhews'] application, the town council balked, and considered and then rejected an entire range of development proposals with densities between 1.0 and 2.93 dwelling units per acre. Indeed, the record shows that the town council considered and rejected countless other alternatives and

> permutations of the development proposals presented by Mayhew. Thus, in the face of "political" opposition from residents of the town, the town council denied the application for development approval. . . .

Mayhew, 774 S.W.2d at 291; App. to Pet. 15. In light of this finding of ripeness, the Town's claim that the state court characterized the ripeness and futility issues as fact questions to be decided by a jury is without merit.[4]

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[4] Although there is limited authority for the Town's assertion that the question of *ripeness* is a matter of law to be determined by the court, *see Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), the Town overlooks the obvious consideration that the ultimate legal determination of ripeness cannot reasonably be made in the absence of a factual predicate to support it. *See, e.g., Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989) (resolution of the ripeness issue turns on the record facts and only the facts tell the court whether a final decision has been reached). The Town effectively argues that because the ultimate legal determination of ripeness is a question of law, a court should not examine any evidence when deciding whether a claim is ripe, even if there are issues of fact relevant to the question of ripeness. However, this would be tantamount to asserting that because the construction of a contract is a question of law, a court should construe the contract without reviewing the document itself. Therefore, even though the state court correctly found the Mayhews' taking claim ripe as a matter of law, it would not have been improper for the court to reserve a decision on ripeness pending resolution of any factual disputes underlying the ripeness determination.

The Court should also note that the second of the two cases cited by the Town for the proposition that ripeness presents a question of law, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988), is entirely devoid of any statement supporting the Town's claim. Additionally, neither *Kinzli* nor *Herrington* support the Town's assertion that a determination as to the futility exception also presents a question of law.

The state court's finding that the Mayhews' taking claim is ripe as a matter of law is also strongly supported by the record. This Court has made clear that a constitutional challenge to a land use regulation is considered ripe for judicial review when the regulatory authority has reached a "final decision" regarding the application of its land use regulations to the property at issue. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 185 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). Although this Court has left open the question of what constitutes a "final decision," Ninth Circuit authority cited by the Town provides guidance on this issue. Under the Ninth Circuit's test, there are two requirements for a final decision: (1) a rejected development plan, and (2) a denial of a variance. *Herrington*, 857 F.2d at 569 (quoting *Kinzli*, 818 F.2d at 1454). There is indisputable evidence in the record showing that each of these two criteria is satisfied. Consequently, it is clear that the Town reached a final decision regarding the application of its land use regulations to the Mayhews' property, and that the Mayhews' taking claim is ripe as a matter of law.

It is undisputed that, following extensive discussions and negotiations between the Mayhews and the Town, and more than six months after the Mayhews filed their application for planned development approval, the Town rejected the Mayhews' development plan, thus satisfying the first element of the Ninth Circuit's final decision test. Additionally, the Town has admitted in its Petition that the Town's zoning ordinance did not contain a variance procedure for the Mayhews to follow after the denial of their application. Pet. 13. In the absence of such a legally

viable option, the second element of the Ninth Circuit's final decision test need not be satisfied. *Herrington*, 857 F.2d at 569-570. Therefore, following the Ninth Circuit authority which is urged on this Court by the Town, the Mayhews have satisfied this Court's final decision requirement, and the state court's finding of ripeness as a matter of law is correct.

The state court's finding that the Mayhews' taking claim is ripe as a matter of law also satisfies a futility analysis because even if the Town did not reach a "final decision," the record shows that it would have been futile for the Mayhews to pursue further development proposals. *MacDonald*, 477 U.S. at 350 n. 7 ("[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures" to determine what use, if any, may be made of his property).

Although this Court has not established a "test" for determining futility, it suggested in *MacDonald* that at least one "meaningful application" for development approval must be submitted before the futility exception applies. *Id.* at 352 n. 8. *See also Kinzli*, 818 F.2d at 1454-1455. The record shows unambiguously that not only did the Mayhews submit a meaningful application for development approval, but also that the Town considered and rejected numerous other proposals. Thus, it would have been futile as a matter of law for the Mayhews to submit yet another additional application for development approval.[5]

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[5] According to the Town, "it was incumbent upon [the Mayhews] to pursue 'a proposal for less intense development' "

(Continued on following page)

The facts supporting this conclusion were aptly noted by the state court:

> Mayhews' application was considered for a period of more than six months. Mayhew had initiated discussions with the town in regard to the proposed development more than a year prior to the town's decision, meeting with town officials on more than twenty occasions *prior* to submitting the application. Mayhew worked closely with representatives of the town, including the town planner, in coming up with an acceptable design proposal, spending over one-half of one million dollars in providing information and studies to provide information showing that the proposed development satisfied the requirements of the town's planned development ordinance and would be an asset to the town. In November of 1986, about half way

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following the denial of their application for development approval in order to satisfy the futility exception. Pet. 13 (quoting *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989). Although a determination of futility arguably requires at least one meaningful application for development approval, *MacDonald*, 477 U.S. at 352 n. 8, the futility exception would be emasculated by an absolute requirement that the developer pursue a proposal for less intense development following the denial of an application for development approval. Indeed, given such a requirement, a regulatory body could force a developer to make successive proposals for less intense development and thereby forestall any legal challenge by the developer indefinitely. Therefore, it would be absurd to conclude that the Mayhews are required at this stage to advance a proposal for less intense development before their claims may be considered ripe. *See* discussion below regarding the history of the Mayhews' attempts to gain development approval.

> through this process, the town decided to revise its comprehensive plan by substantially decreasing the amount of density that would be permitted in the town, all while Mayhew's application was pending. Subsequently, Mayhew's representatives met with town officials, including the town attorney, the town manager, [and two town council members], to discuss the proposed development. At that meeting, Mayhew agreed to scale down the application substantially from the 5,025 units originally sought to 3,600 dwelling units and to abandon the apartments because of the town's "concerns" over the inclusion of apartments and other forms of low and moderate cost housing in the proposed development. In the end, Mayhew acceded to the demands of town officials. But when the time came to vote on the application, the town council balked, and considered and then rejected an entire range of development proposals with densities between 1.0 and 2.93 dwelling units per acre. Indeed, the record shows that the town council considered and rejected countless other alternatives and permutations of the development proposals presented by Mayhew.

Mayhew, 774 S.W.2d at 290-291, App. to Pet. 14-15 (emphasis in original). As this passage illustrates, it would have been futile, both as a practical matter and as a matter of law, for the Mayhews to file another formal application for development approval. Therefore, even if the Town's rejection of the Mayhews' application was not a "final decision," the state court nevertheless correctly found that the Mayhews' taking claim is ripe. *MacDonald*, 477 U.S. at 352 n. 8.

The Town denies in its Petition that it would have been futile for the Mayhews to pursue another development proposal and claims that the Mayhews' taking

challenge is not ripe as a matter of law. Pet. 7-9. The sole basis for the Town's claim is its insistence that "an appropriate density figure for review has yet to be determined." Pet. 8. This argument, however, is not only refuted by the undisputed evidence discussed above showing that the Town denied a meaningful application for development approval and rejected attempts at compromise, it is also grounded on a tortured hypothetical reading of the record which violates established summary judgment rules of review.

According to the Town, the Town Council "was receptive to a plan with a proposed density of substantially more than one unit per acre but less than the 3.2 units per acre demanded by the Mayhews."[6] Pet. 7. In order to support this statement, however, the Town has turned the standard for reviewing a motion for summary judgment on its head.[7] The Town, the *movant* on summary judgment below, has effectively asked this Court to resolve all inferences in its favor and to indulge in speculation as to a development density level which would have been supported by the Town Council:

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[6] As it has repeatedly done throughout the course of this litigation, the Town again misrepresents the density of development under the Mayhews' plan as 3.2 dwelling units per acre rather than the 2.93 dwelling units per acre which the plan actually called for.

[7] It is well established that in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the *non-movant* is to be taken as true and every reasonable inference must be indulged in favor of the *non-movant* and any doubts resolved in its favor. *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 548-549 (Tex. 1985).

> The discussions of the Town Council conclusively establish that rigid adherence to one acre zoning unequivocally was not a condition for the Mayhews' planned development approval, as density levels of 2.0, 2.3, 2.6, and 3.3 units per acre were deemed acceptable by the individual councilmembers. *Assuming the most restrictive scenario,* a plan asking for 2 units per acre would have passed by a 4-to-1 vote.

Pet. 7, footnote (emphasis added). This mere conjecture violates summary judgment rules and is insufficient to prove that an appropriate density figure for review has yet to be determined.

In summary, the Town's ripeness argument fails to present a substantial federal question meriting the attention of this Court. The state court correctly found that the Mayhews' taking claim is ripe as a matter of law, and that finding is firmly supported by the summary judgment evidence. Therefore, this Court should reject the Town's Petition for a Writ of Certiorari.

B.

The State Court's Taking Analysis Was Consonant With Established Taking Jurisprudence

The Town's second argument for granting its Petition for a Writ of Certiorari is that the state court erred in its consideration of the Mayhews' taking claim because the court "improperly focused its analysis upon the Town's decision to deny the Mayhews' application without considering the remaining uses available to the Mayhews by the Town's Zoning Ordinance" and thereby failed to address the second prong of the taking test set forth in

Agins v. City of Tiburon, 447 U.S. 255 (1980).[8] Pet. 14-15. The Town's argument is misdirected for at least two reasons.

First, the Town incorrectly assumes that the application of the Town's zoning ordinance to the Mayhews' property substantially advances a legitimate state interest and therefore does not, as a matter of law, effect a taking under the first element of the *Agins* analysis.[9] Second, even if the state court did not expressly address the second element of the *Agins* taking test, the record shows that, at the very least, there is a genuine issue of material fact with regard to the economic viability of any remaining uses. In either case, there is no substantial federal question which merits the attention of this court. Rather, there are only questions of fact which must be resolved at the trial which the Town now so strenuously seeks to avoid.

With respect to the first element of the taking analysis, the Town again seeks to stand the summary judgment standard of review on its head. Obviously indulging every reasonable inference in its favor, the Town baldly asserts that "there can be no doubt that the conservation and preservation of open space, and the

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[8] In *Agins* this Court held that:

> [t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . .

447 U.S. at 260 (citations omitted).

[9] A regulation that fails *either* prong of the *Agins* test constitutes a taking. *Agins*, 447 U.S. at 260; *Nollan v. California Coastal Commission*, 483 U.S. 825, 835-836 (1987).

desire of the Town to protect its residents from the 'ill effects of urbanization' are legitimate state interests that are substantially advanced by the Town's one-acre zoning provisions." Pet. 15. The Town's claim, however, has no basis in law or fact.

While the Mayhews do not doubt that the preservation of open space and the protection of residents from the ill effects of urbanization are legitimate state interests, it is far from settled that the Town's regulations and their application to the Mayhews' property will promote those purposes. At a minimum, there is a genuine issue of material fact with respect to this inquiry. Therefore, the state court was correct in reversing the granting of summary judgment to the Town.

As support for its argument, the Town misrepresents the holding of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), by suggesting that *Agins* stands for the proposition that "one acre zoning" furthers legitimate state interests. In fact, the *Agins* Court never considered whether it was reasonable to believe that the ordinance *as applied* advanced the proffered purposes. Instead the Court simply accepted the findings of the California Legislature for the purposes of the *facial challenge* with which it was presented:

> The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses."

Agins, 447 U.S. at 261.

Additionally, the ordinance sustained in *Agins* was markedly different from the Town's zoning ordinance

because the *Agins* ordinance specifically provided for maximizing open space. *Agins*, 447 U.S. at 257, 262. *See also Agins v. City of Tiburon*, 157 Cal. Rptr. 372, 598 P.2d 25, 27 (Cal. 1979). Unlike the *Agins* ordinance, however, the Town's zoning ordinance requires "cookie cutter" development of one acre lots with single family homes uniformly positioned and centered, one to a lot. In addition, notwithstanding the Town's alleged interest in preserving open space, its zoning ordinance includes requirements for curbs, gutters and alleys. Furthermore, the Town's ordinance does not provide for clustering to maximize open space nor does it consider whether the development would be compatible with adjoining open space or would preserve the surrounding environment. Therefore, the Town's reliance on *Agins* as proof that one-acre zoning furthers legitimate state interests as a matter of law is misplaced.

The Town's contention that one-acre zoning preserves open space and protects its residents from the ill effects of urbanization is also without foundation in fact. For example, the Town's own professional land use planner testified in his deposition that development of the vacant land in the Town with one-acre lots would eliminate the Town's open space and destroy the rural, rustic and countryside character of the Town. Nonetheless, solely on the basis of its sweeping mischaracterization of the holding in *Agins*, the Town now claims "there can be no doubt" that its one-acre zoning advances its claimed state interests. It is evident, however, that the only way the Town's one-acre zoning will preserve open space is if, as the Mayhews allege, the Town's regulations prevent *all development* of the Mayhews' property. Therefore, the

application of the Town's zoning ordinance to the Mayhews' land has effected a taking of that land as a matter of law.[10]

Finally, even if a taking is not established as a matter of law, at a minimum there is a material factual issue as to whether the Town's zoning ordinance, as applied to the Mayhews' property, substantially advances legitimate state interests, and the Mayhews have a well-established right to present evidence on this issue at a trial. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends on facts beyond the sphere of judicial notice, *such facts may properly be made the subject of judicial inquiry* . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.") (citations omitted) (emphasis added).

Assuming *arguendo* that the Town's one-acre zoning advances legitimate state interests, the Town's regulations nevertheless effect a taking of the Mayhews' land because they prohibit any economically viable use of that land. *See Agins*, 477 U.S. at 260. At a minimum, there is a material factual issue with respect to this second

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[10] *See, e.g., Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311-312 (1987); and *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 834-836 (1987).

element of the *Agins* taking test, and this issue is sufficient to sustain the state court's determination that the Town is not entitled to summary judgment on the Mayhews' constitutional claims.

The record established in the state courts shows that the Town's zoning ordinance and its decision to deny development approval deprive the Mayhews of all economically viable use of their land. For example, the summary judgment evidence shows that there is no real market for one acre lots in the Town and that the only one-acre zoned subdivision developed to the Town's standards was an economic disaster. In addition, the summary judgment proofs establish that the Mayhews could expect to market no more than 11 one-acre lots per year, a factor which would require more than 100 years to market the Mayhews' property, that it is economically impossible to develop the Mayhews' property according to the Town's requirements, and that agricultural use of the property is not economically viable (*i.e.* income or land rents from agriculture were insufficient to cover ownership and maintenance costs).

In response to this evidence, the Town merely points to two appraisals prepared for the Mayhews which show a substantial value for the Mayhews' property prior to the Town's denial of the application and a significant diminution in value following the Town's denial. Pet. 17. The first appraisal, however, has virtually no probative value because it was based on comparable land sales, most of which involved property located *outside of* the Town, and it assumed that the development of the property would be permitted in accordance with the development trends in the general area, an unwarranted

assumption given the Town's decision regarding the Mayhews' application. In addition, the conclusions of the second appraisal are controverted by the Mayhews' summary judgment proofs. Therefore, even if the Town has not taken the Mayhews' property as a matter of law, the most that can be said is that the record presents a genuine issue of material fact as to whether an economically viable use of the Mayhews' property remains.

Similarly unfounded is the Town's claim that it never "took" anything from the Mayhews because the Mayhews possessed no reasonable investment-backed expectations (*i.e.*, property rights). *See* Pet. 17-19. One of the Mayhews has owned over 70% of the subject property for more than 40 years, long before the Town instituted its one-acre zoning. In light of this long period of ownership, it is absurd to suggest that the Mayhews' could have no reasonable investment-backed expectations in their land.

Moreover, the Town's argument that prior knowledge of zoning restrictions precludes a reasonable investment-backed expectation based on less restrictive zoning demeans the constitutional stature of property rights. *See* Pet. 18-19. To suggest that an otherwise overly restrictive regulation is constitutional so long as it was put in place prior to the current ownership is simply wrong. Indeed, this Court recently rejected this very argument:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan, 483 U.S. at 833 n.2. Consequently, it is clear that the Mayhews possess legitimate investment-backed expectations and that, at a minimum, there is a genuine issue of material fact as to whether the Town's denial of their application denied them all economically viable use of their land.

In summary, the Town's argument that the state court erred by allegedly failing to consider alternative uses of the subject property is plainly erroneous. The Town incorrectly assumes that its zoning ordinance advances legitimate state interests, and it fails to show, as a matter of law, that there are economically viable uses of the Mayhews' property under the Town's one-acre zoning. The state court was correct in finding that the Town was not entitled to summary judgment. Therefore, this Court should reject the Town's Petition.

C.

The Mayhews' Vagueness Challenge Survives The State Court's Decision That The Town's Denial Of Development Approval Was A Legislative Act

The Town's third argument arises from the state court's determination that the Town's consideration of the application for planned development approval was a legislative act for the purposes of Civil Rights Act immunity. The Town claims that the state court's finding in regard to immunity means that the Mayhews' due process claims should be dismissed. Pet. 19-22. While it is undoubtedly true that procedural due process rights to notice and hearing do not attach to legislative acts, the Town's argument cuts too far and is without merit.

The Town erroneously assumes that when a vagueness claim bears the caption "procedural due process," the challenged law does not have to comply with the constitutional requirements for minimal certainty, simply because the law is legislation. This assumption is unfounded.

The vagueness doctrine requires that legislation be sufficiently definite to give affected persons fair warning of what is permitted and prohibited:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence the opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, *laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (emphasis added) (footnotes omitted). This requirement, however, is fundamentally different than the procedural due process guarantees of notice and hearing.[11] Although

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[11] The court in *Jackson Court Condominiums, Inc. v. City of New Orleans*, 665 F.Supp. 1235 (E.D. La. 1987), *aff'd*, 874 F.2d 1070 (5th Cir. 1989), recognized a distinction between the procedural due process claims (notice and hearing) and the vagueness claims raised. Significantly, the fact that the action challenged there was determined to be legislative did not have any effect on the vagueness challenges, although the procedural due process challenges were dismissed.

the Constitution may not command that all persons are to have notice of and an opportunity to be heard on pending legislation, it does require that legislation satisfy minimal standards of certainty. Therefore, the mere fact that the Mayhews' vagueness claims are denominated "procedural due process" does not defeat those claims nor does it shield the Town's ordinances from scrutiny under a vagueness analysis.

D.

The State Court's Treatment Of The Mayhews' Facial Challenges Was Consistent With Settled Law

The Town claims in its final argument that the state court incorrectly found that the Mayhews' facial constitutional challenges[12] are predicated upon disputed factual issues. Pet. at 22. This argument fails because, as a plain reading of the state court's opinion shows, the court did not specifically address the Mayhews' facial claims. Moreover, this Court has made clear that, contrary to the Town's assertion, the underlying facts and factual issues are relevant to a court's consideration of each of the Mayhews' facial challenges.

For example, in *United States v. National Dairy Products Corp.*, 372 U.S. 29, 31-32 (1963) this Court stated that it does not evaluate in the abstract the validity of a statute which is attacked as vague on its face. Additionally, in *New York State Club Ass'n, Inc. v. City of New*

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[12] The Mayhews have asserted three facial challenges in their petition for relief claiming violations of their rights to substantive due process and equal protection, and of the vagueness doctrine. They have also asserted "as applied" challenges under each of these doctrines.

York, 487 U.S. 1, 17-18 (1988) this Court found that a facial equal protection challenge of an amendment to a local human rights law failed because there was no evidentiary showing that legislatively-created classes were identical in critical respects. Finally, given that the rational basis test employed in a non-suspect classification equal protection challenge (such as that involved in *New York State Club Ass'n*, 487 U.S. at 16) is essentially the same as the test employed in a substantive due process challenge, *see Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 12 (1981), it follows that facts and factual issues are also relevant to consideration of a facial substantive due process claim. In light of the above cases, it is clear that facts and factual issues are relevant to the Mayhews' facial claims, and the Mayhews should have an opportunity to present facts and attempt to resolve any factual issues in their favor at a trial on the merits of those claims.

CONCLUSION

This Court is without jurisdiction to review this case because the state court's decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Additionally, even if there was a final decision in the state court, this Court should deny the writ because the Town has failed to establish that the state court committed any error or that this case presents a substantial federal question meriting the attention of this Court.

Therefore, the Mayhews respectfully pray that this Court deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Texas.

Respectfully submitted,

CHARLES L. SIEMON
Counsel of Record

GERALD P. CALLAGHAN
JAMES N. AZIM, III
SIEMON, LARSEN & PURDY
Dearborn Station
47 West Polk Street
Chicago, Illinois 60605

Counsel for Respondents